March 10, 2021

The Honorable Janet Yellen
Secretary, United States Department of the Treasury
1500 Pennsylvania Ave., NW
Washington, DC 20220

Dear Secretary Yellen:

On behalf of the undersigned organizations, which advocate for millions of taxpayers across America, we write first to offer our congratulations and best wishes to you as the new Secretary of the United States Treasury. It is our hope that in days to come, we will build constructive working relationships on many matters, even as we may respectfully offer differing views on certain tax and fiscal policies.

Among those matters where we may find common ground is our abiding, mutual concern for a well-functioning, balanced system of tax administration. We were therefore encouraged by several of your thoughtful responses during your confirmation process regarding improvements to *how* tax laws are implemented, beyond *what* those laws may stipulate. One of your replies to a Question for the Record from Senator Portman on Section 170(h) deductions (pertaining to conservation easements) was particularly encouraging to us:

> Question: ...Will you commit to working with the IRS to publish sample deed language so that taxpayers can have certainty when making donations, helping to further this important policy goal? Once we have this guidance, I think it is important that we provide an opportunity for taxpayers to come into compliance with the new rules.
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> Answer: Taxpayer certainty with regard to tax treatment in all issues is an important goal for the system at large. If confirmed, I will strive to meet that goal through the issuance of taxpayer guidance, and I appreciate the importance of creating certainty for taxpayers on this issue.[1]

Secretary Yellen, we could not agree more with your assessment, and we urge you to take timely steps that provide a framework within which the IRS may develop such guidance.

As you may know, our organizations have taken an active, collaborative role with Congress and the Executive Branch in formulating sound tax administration policies – some of us, for more than five decades. We therefore write from deep experience in cautioning that the compliance, examination, and enforcement procedures evolving around Internal Revenue Code Section 170(h) present grave implications for the entire tax system. Ever since the issuance of IRS Notice 2017-10, which declared certain conservation easement arrangements to be listed transactions, we have noted with alarm numerous trends that will affect how tens of millions of taxpayers – not just the thousands claiming Section 170(h) deductions – could be treated in the future. Just a few of those trends are:

- **Retroactivity.** Although issued in late 2016, Notice 2017-10 has been the basis of a near-100 percent IRS audit rate of partnership-based conservation easement transactions, some dating back many years prior. Audits are, by their nature, backward-looking, yet they are normally confined to establishing whether a taxpayer faithfully complied with laws, rules, and other guidance that were firmly anchored in place during the year for which the examination was launched. Current IRS audits of partnership easements are often based on the Service's shifting interpretations of laws and rulings, some of them upending decades of established understanding of how Section 170(h) deductions should be structured. Retroactivity, especially of such an egregious nature as this, is counterproductive and ill-advised.

- **Arbitrary Litigation Strategies.** Going with the Service's extremely aggressive assertion of retroactive application of its shifting positions in audits has been its similarly fluid stance in court. The first wave of IRS lawsuits challenging Section 170(h) deductions tended to center on the appraised value of the conservation easements underlying the taxpayers' claims. Yet, after a string of court losses where the government fatuously argued zero or minimal value to all the easements under scrutiny, further waves of IRS litigation made far more exotic arguments against "foot faults" involving highly technical details of easement agreements themselves – details which the entire conservation and historic preservation communities had long regarded as settled features.

[1] See Questions for the Record, U.S. Senate Committee on Finance, Hearing on the Nomination of Dr. Janet Yellen, Responses by Dr. Yellen, January 21, 2021, p. 61.

- **Capricious Enforcement Tactics.** Even prior to Notice 2017-10, taxpayers claiming the Section 170(h) deduction were experiencing harsh treatment at the hands of the tax agency. As Senators Blumenthal and Murphy reported in a 2016 communication to then-Commissioner Koskinen, "constituents describe audits focused on their donation of a conservation easement as antagonistic, aggressively adversarial, lengthy, and expensive." Such reports, some of which have been communicated directly to us, have accelerated since partnership easements became a listed transaction. These accounts bear the hallmarks of troubling Service behavior that we witnessed in the late 1980s, early 1990s, and early 2010s – all of which necessitated sweeping corrective legislation as well as managerial overhauls at the tax agency. Such disruption should be avoided if at all possible, and can be now with modest effort.

- **Collateral Damage to Taxpayer Rights Laws.** Inevitably, the tactics mentioned above are leading to another pattern we have observed in the past – a corrosive attitude within the IRS toward laws for we which we strongly advocated, such as the Taxpayer Bill of Rights of 1988 and the IRS Restructuring and Reform Act of 1998 (RRA '98). One of our organizations has already deemed it necessary to file amicus briefs in court cases involving two such problems: the Service's indifference to RRA 98's supervisor approval requirement for penalty determinations, as well as its apparent disregard for even the barest formalities of the Administrative Procedure Act in crafting guidance.[2] Other problems include the IRS's quiet disposal of longstanding due process procedures for appraiser diligence matters.[3] These cases, and several more we are scrutinizing, originally pertained to conservation easements, but are allowing the IRS to steadily build an arsenal of legal precedents that can be wielded against taxpayers in all types of financial situations.

- **Conflict with Other Policy Goals.** The Biden Administration has committed to the objective of conserving 30 percent of lands and oceans by the year 2030. Regardless of whether one supports this particular policy, as a practical matter its execution will entail reliance on a variety of tools, including private sector-driven conservation. Given that easements have so far protected well over 30 million acres in the U.S. – a rapidly rising figure – from an environmental standpoint it would be a tremendous mistake to allow private land conservation to be undercut because of careless, opaque tax administration.

The IRS National Taxpayer Advocate (NTA) has recommended (and in January reiterated) that "because litigation in this area may very well continue for years," the Service ought to "[d]evelop and publish additional guidance that contains sample easement provisions to assist taxpayers in drafting deeds that satisfy the statutory requirements for qualified conservation contributions."[4] This sensible approach could, under your leadership, be quickly facilitated by forming a working group of expert stakeholders inside and outside of government under a 90-day deadline to formulate the guidance. This in turn could be subject to public notice and comment so that, by late summer of this year, a great measure of consistency and transparency could finally be brought to an area of tax administration that has proven burdensome both to the Service and to taxpayers. As IRSAC's recommendations some 15 years ago with historic preservation easements, and the creation of a panel to settle valuations of donated art both demonstrate, reaching agreement on complex issues in the Section 170 space is feasible if all parties come to the table in good faith.

Secretary Yellen, we hope you will take this early opportunity to forge a consensus over a long-troubled area of tax administration that can, with a relatively small investment of time and effort, yield major dividends for taxpayer compliance and confidence.

Should you wish to discuss this or any other tax administration issue further, we would certainly welcome the opportunity. Thank you for your consideration.

Sincerely,

Pete Sepp, President
National Taxpayers Union

Alexander Hendrie, Director of Tax Policy
Americans for Tax Reform

Ryan Ellis, President
Center for a Free Economy

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[2] See, for example, https://www.ntu.org/publications/detail/ntu-files-amicus-brief-in-taxpayers-rights-case and https://www.ntu.org/foundation/detail/ntuf-amicus-brief-taxpayers-harmed-by-irss-shifting-positions-and-ambiguous-regulations-on-easements.
[3] See, for example, https://www.ntu.org/publications/detail/open-season-again-on-conservation-minded-taxpayers.
[4] See https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2021/01/ARC20_FullReport.pdf, p. 216.